

Tenn Op. Atty Gen No 90-83, 1990 WL 513064 (Tenn.A G)

(Cite as: 1990 WL 513064 (Tenn.A.G.))

cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service. T.C.A. § 1-3-103, § § 65-4-104, -107, -201 et seq , -207, § § 65-29-101 et seq , -102, -130.

***2 TELEPHONE**

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T C A § 65-4-107, a telephone cooperative is prohibited by T C.A § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available"; the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T C A § 1-3-103, § § 65-4-104, -107, -201 et seq , -207, § § 65-29-101 et seq , -102, -130.

Authority of Municipality to Permit a Competing Telephone Company or Cooperative Within its Jurisdiction

The Honorable Jerry W Cooper
State Senator
Room 307, War Memorial Building
Nashville, Tennessee 37243-0214

QUESTIONS

- (1) Whether a municipality may permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company?
- (2) Whether a telephone cooperative organized under T.C.A. § 65-29-101 et seq can conduct business in a municipality which already possesses existing telephone service administered by a telephone company?

OPINIONS

- (1) No, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T.C.A § 65-4-107.
- (2) A telephone cooperative is prohibited by T C A. § 65-29-102 from providing service in an area where "reasonably adequate telephone service is available " The question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service.

ANALYSIS

The establishment, regulation and control of public utilities, including telephone companies, is governed by Chapter 4 of Title 65 of the Tennessee Code. Chapter 4 is divided into three specific parts, with part 1 detailing the general provisions of Chapter 4, part 2 addressing the certificate of public convenience and necessity required of each public utility, and part 3 detailing both the Commission's powers to inspect and control public utilities as well as the supervision fee required to be paid by public utilities

*3 T C A. § 65-4-104, contained in part 1 of Chapter 4, grants the Tennessee Public Service Commission general supervision and regulation of, and jurisdiction and control over, all public utilities, and also over their property, property rights, facilities and franchises T C A § 65-4-107, also in part 1, specifically provides that no privilege or franchise granted to any public utility by the State of Tennessee or by any political subdivision thereof shall be valid until approved by the Public Service Commission, with such approval to be given after a hearing and a determination by the Commission that such privilege or franchise "is necessary and proper for the public convenience and properly conserves the public interest."

Part 2 of Chapter 4, codified at T.C.A. § 65-4-201 et seq, provides that no public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the Tennessee Public Service Commission, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment and operation T.C.A. § 65-4-207 however provides that the "provisions of this part shall not apply where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county " (Emphasis added)

The initial question raised in this opinion request focuses on these provisions, and specifically whether T C A. § 65-4-207 grants a municipality the authority to permit a competing telephone company to come into the municipality when the Public Service Commission has not approved the competing telephone company's entry into the territory of the municipality. The Tennessee Supreme Court in 1933 definitively answered this question in the negative in the case of Holston River Electric Co. v Hydro Electric Corp, 166 Tenn 662, 64 S W 2d 509 (1933)

In that case, the town of Rogersville had issued in 1932 a franchise to the Hydro Electric Corporation, authorizing it to distribute and sell electric power within Rogersville, without the approval of the Railroad and Public Utilities Commission, the predecessor to the Public Service Commission At the time this municipal franchise was granted to the Hydro Electric Corporation, Holston River Electric Company was exercising a similar franchise granted to it by Rogersville in 1926 for a term of 25 years Holston River Electric Company commenced litigation seeking an injunction restraining the Hydro Electric Corporation from operating under its franchise unless it was approved by the Public Utilities Commission, as required by section 5453 of the Tennessee Code, presently codified at T.C.A. § 65-4-107

Hydro Electric Corporation contended that the approval of the Public Utilities Commission was not necessary, since section 5508 of Code, presently codified as T C A § 65-4-207, allowed a municipality by resolution or ordinance to declare that a public necessity required a competing company in the municipality. The Court found that a municipality could not by itself authorize such a competing telephone company, even under present § 65-4-207, reasoning as follows:

*4 Section 5453 of the Code, in article 1 of chapter 23 [presently codified as T C A § 65-4-107], deals specifically with franchises granted to public utilities by the state or its subdivisions, and expressly makes the approval of the Railroad and Public Utilities Commission [now the Public Service Commission] a condition precedent to the validity of any such franchise. This provision embodies a most important matter of public policy, which we cannot presume the Legislature would either adopt or discard without plainly and deliberately expressing its intention.

Sections 5502-5508, comprising article 2 of the same chapter of the Code [presently codified at T C A § 65-4-201 et seq], do not deal with franchises, but directly refer to and purport to regulate physical operations of public utilities. Since no such operations may be undertaken by a company not in possession of a franchise, whenever one is required, by law, it would seem that the regulations and control prescribed by these sections were intended to apply to and affect a utility, already holding any required franchise with the commission's approval, which might be about to engage in some specific operation in competition with another similar company. The certificate of public convenience and necessity required by these sections is clearly in addition to and not a substitute for the commission's approval of the franchise, required by section 5453 [T.C.A. § 65-4-107].

Giving effect to the rule of construction prescribed in section 13 of the Code [FN1] as well as to the general rule that the various sections of the Code must be reconciled, if their language reasonably permits it (Dagley v State, 144 Tenn., 501, 507, 508, 234 S W , 333), we are of opinion and so hold that the Code sections 5502-5508 were not intended to and do not repeal the provision of section 5453 which requires the approval of the Railroad and Public Utilities Commission as a condition to the validity of all franchises included in that section.

Holston River Electric Co v Hydro Electric Corporation, 166 Tenn 662, 667-668, 64 S W 2d 509 (1933). See also Briley v Cumberland Water Co., 215 Tenn 718, 727-728, 389 S W, 2d 278 (1964) (Supreme Court stating that a municipality could not grant a valid franchise to a utility without the approval of the Public Service Commission, given after a hearing in which the Commission determines the franchise is necessary and proper for the public convenience and properly conserves the public interest).

Thus it appears that even though a municipality under T.C.A. § 65-4-207 may authorize a telephone company and dispense with the necessity of obtaining a certificate of convenience and necessity under § § 65-4-201 to -206, the approval of the Public Service Commission is still necessary pursuant to T.C.A. § 65-4-107 before the telephone company may operate.

Secondly, a municipality can only allow a telephone cooperative organized under T C A § 65-29-101 et seq. (the Telephone Cooperative Act) to conduct business in the municipality if it is determined under T C A. § 65-29-102 that "reasonably adequate telephone service" is not available to the municipality. Very unusual circumstances would have to be shown before a municipality already being serviced by a telephone company would qualify to be serviced by a telephone cooperative.

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[FN2] In any event, the ultimate question of whether a telephone cooperative could enter the territory of such a municipality is one for the Public Service Commission, since T.C.A. § 65-29-103 grants the Commission jurisdiction to resolve any territorial disputes between a telephone cooperative and any other entity rendering telephone service

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Attorney General and Reporter

John Knox Walkup

Solicitor General

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Assistant Attorney General

[FN1] Section 13, now codified at T C A § 1-3-103, declares, "[i]f provisions of different chapters or articles of the Code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the subject matter of that chapter or article "

[FN2] Even in those circumstances, the terms of the franchise granted to the existing company would be relevant in determining its rights versus those of a competing cooperative.

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Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF AVR, L.P. D/B/A HYPERION OF TENNESSEE, L.P. PETITION FOR
PREEMPTION OF TENNESSEE CODE ANNOTATED § 65-4-201(D) AND TENNESSEE REGULATORY
AUTHORITY DECISION DENYING HYPERION'S APPLICATION REQUESTING AUTHORITY TO
PROVIDE SERVICE IN TENNESSEE RURAL LEC SERVICE AREAS
CC Docket No. 98-92

FCC 99-100

Adopted: May 14, 1999

Released: May 27, 1999

*11064 By the Commission:

1. On May 29, 1998, AVR, L.P. d/b/a Hyperion of Tennessee, L.P. (Hyperion) filed the above-captioned petition (Petition) asking the Commission to: (i) preempt Tenn. Code Ann. § 65-4-201(d), and (ii) preempt the enforcement of the April 9, 1998, order of the Tennessee Regulatory Authority (Authority or Tennessee Authority) denying Hyperion a Certificate of Public Convenience and Necessity (CPCN) to provide local exchange service in areas of Tennessee served by the Tennessee Telephone Company (Denial Order). [FN1] Hyperion also asks the Commission to direct the Tennessee Authority to grant Hyperion's application for a CPCN. [FN2] Hyperion asserts that the Tennessee Authority's Denial Order and Tenn. Code Ann. § 65-4-201(d) violate section 253(a) of the Communications Act of 1934, as amended, [FN3] *11065 fall outside the scope of authority reserved to the states by section 253(b) of the Act, [FN4] and thus satisfy the requirements for preemption by the Commission pursuant to section 253(d) of the Act. [FN5]

2. For the reasons described below, we grant Hyperion's Petition in part and deny it in part. Specifically, we preempt the enforcement of the Tennessee Authority's Denial Order and Tenn. Code Ann. § 65-4-201(d), [FN6] but we decline to direct the Tennessee Authority to grant Hyperion's CPCN application. We expect, however, that upon a request from Hyperion, the Authority will expeditiously reconsider Hyperion's CPCN application in a manner consistent with the Communications Act and with this Memorandum Opinion and Order.

II. BACKGROUND

3. Hyperion is a facilities-based competitive local exchange carrier operating in twelve states. [FN7] Hyperion has constructed a fiber-based network in the Nashville, Tennessee area, and is in the process of extending that network into outlying areas of Tennessee, including areas currently served by the Tennessee Telephone Company (Tennessee Telephone). [FN8] Tennessee Telephone serves fewer than 100,000 residential and business customers in Tennessee. [FN9]

4. On August 24, 1995, the Tennessee Public Service Commission (TPSC, the

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EXHIBIT

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predecessor to the Tennessee Authority) found that Hyperion possessed the requisite technical, managerial, and financial qualifications to render local exchange services, and granted *11066 Hyperion a CPCN to provide such services in Tennessee. [FN10] The following March, however, the TPSC issued an order limiting Hyperion's certificate to only those areas of Tennessee that are served by companies having 100,000 access lines or more within the state. [FN11] The TPSC explained that, under Tennessee law, incumbent LECs serving fewer than 100,000 access lines were protected from competition "until the incumbent LEC either '... voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider' or the incumbent LEC ... 'applies for a certificate to provide telecommunications services in an area outside its service area.'" [FN12]

5. Hyperion, believing the restriction to be inconsistent with the 1996 Act, petitioned the Tennessee Authority on January 2, 1998, for permission to extend its service into the areas served by Tennessee Telephone. On April 9, 1998, the Authority denied Hyperion's application. The Authority based its denial on Tenn. Code Ann. § 65-4-201, which in relevant part provides:

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules, and orders, and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on the June 6, 1995. [FN13]

*11067 6. The transcript of the Tennessee Authority's March 10, 1998, hearing denying Hyperion's application reveals that disagreement arose within the Authority on the effect of Tenn. Code Ann. § 65-4-201(d) on Hyperion's petition. [FN14] The incumbent LEC into whose service territory Hyperion wished to expand, Tennessee Telephone, served fewer than 100,000 access lines in Tennessee, so it clearly fell within the class protected from competition by Tenn. Code Ann. § 65-4-201(d). During the hearing, however, the Authority's Chairman argued that subsection (d) was inconsistent with the 1996 Act's purpose and the plain meaning of section 253(a), which preempts state legal requirements that prohibit the provision of telecommunications service. [FN15] The Authority's two other Directors argued that subsection (d) lay within the regulatory authority reserved to the states in section 253(b), which excludes from preemption state or local requirements necessary to protect universal service and certain other public interest goals, if such requirements are competitively neutral and consistent with the Act's universal service provisions. [FN16] In its Denial Order, the Authority concluded that Tenn. Code Ann. § 65-4-201(d) does satisfy the requirements of section 253(b), and that

therefore section 253(b) operates as a limitation on Hyperion's challenge under 253(a). [FN17] Hyperion contends that Tenn. Code Ann. § 65-4-201(d) is inconsistent with section 253 and with Commission precedent, and on that basis petitions us to preempt Tenn. Code Ann. § 65-4-201(d) and the Tennessee Authority's Denial Order. [FN18]

7. In assessing whether to preempt enforcement of the Denial Order and Tenn. Code Ann. § 65-4-201(d) pursuant to section 253, we first determine whether those legal requirements are proscribed by section 253(a), which states:

No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the *11068 ability of any entity to provide any interstate or intrastate telecommunications service. [FN19]

8. If we find that the Denial Order and Tenn. Code Ann. § 65-4-201(d) are proscribed by section 253(a) considered in isolation, we must then determine whether, nonetheless, they fall within the reservation of state authority set forth in section 253(b), which provides:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. [FN20]

9. If the Denial Order and Tenn. Code Ann. § 65-4-201(d) are proscribed by section 253(a), and do not fall within the scope of section 253(b), we must preempt the enforcement of those legal requirements in accordance with section 253(d), which provides:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. [FN21]

10. Hyperion maintains that because it has met the technical, managerial, and financial qualifications to provide service, only Tenn. Code Ann. § 65-4-201(d)'s protection of incumbent LECs serving fewer than 100,000 lines, and the Denial Order enforcement of that statutory provision, prevented Hyperion from providing local exchange service in Tennessee Telephone's service areas. [FN22] Hyperion further maintains that these legal requirements fall squarely within section 253(a)'s proscription of state legal requirements that prohibit the ability of any entity to provide any telecommunications service. [FN23] According to *11069 Hyperion, Tenn. Code Ann. § 65-4-201(d) and the Denial Order are virtually identical to two previous state requirements which ran afoul of section 253(a), and which the Commission preempted in the Texas Preemption Order and Silver Star Preemption Order decisions. [FN24]

11. Neither the Tennessee Authority nor TDS Telecommunications Corporation (TDS) argues that the Denial Order or Tenn. Code Ann. § 65-4-201(d) can survive section 253(a) considered in isolation, but they insist that the statutory provision and the Denial Order fall within the reservation of state authority provided in 253(b). [FN25] Specifically, the Tennessee Authority argues that Tenn. Code Ann. § 65-4-

201(d) falls within section 253(b) because the provision is necessary to preserve and advance universal service and other public welfare goals, [FN26] and because the provision applies in a competitively neutral manner to all non-incumbent LECs. [FN27] The Authority explains that Tenn. Code Ann. § 65-4-201(d) is competitively neutral because the restriction on entry into the service areas of small LECs applies to all providers within the state, and thus they argue that no provider is given a competitive advantage over any other. [FN28] TDS likewise maintains that the Authority's denial of Hyperion's application is a proper exercise of state authority under 253(b) because it is consistent with the universal service provisions of the 1996 Act, [FN29] is necessary to protect consumer interests, [FN30] and is competitively neutral. [FN31] TDS contends that potential competing LECs are not subject to the same terms and conditions as incumbent LECs, and that the Tennessee Authority may therefore treat them differently and still maintain competitive neutrality. [FN32] Hyperion and its supporters disagree, and argue that section 253(b) does not exempt Tenn. Code Ann. § 65-4-201(d) and the Denial Order from preemption, because the *11070 code and the Denial Order favor the incumbent LEC over new entrants, and are therefore not "competitively neutral" under section 253(b). [FN33]

III. Discussion

12. We conclude that, in denying Hyperion the right to provide competing local exchange service in the area served by Tennessee Telephone, Tenn. Code Ann. § 65-4-201(d) and the Tennessee Authority's Denial Order violate section 253(a). We further conclude that, because these state and local legal requirements shield the incumbent LEC from competition by other LECs, the requirements are not competitively neutral, and therefore do not fall within the reservation of state authority set forth in section 253(b). Finally, we conclude that, because the requirements violate section 253(a), and do not fall within the boundaries of section 253(b), we must preempt the enforcement of Tenn. Code Ann. § 65-4-201(d) and the Denial Order, as directed by section 253(d)

13. The case before us is similar to two cases the Commission has previously decided. In the Silver Star Preemption Order, the Commission preempted the enforcement of a provision of the Wyoming Telecommunications Act of 1995 [FN34] that empowered incumbent LECs serving 30,000 or fewer access lines in Wyoming to preclude anyone from providing competing local exchange service in their territories until at least January 1, 2005. [FN35] The Commission also preempted the enforcement of an order of the Wyoming Public Service Commission denying, on the basis of that provision, the application of Silver Star Telephone Company to provide competing local service in a neighboring incumbent's local exchange area. [FN36] In ordering the preemption, the Commission determined that the rural incumbent protection provision and the Wyoming Commission's Denial Order fell within the proscription of entry barriers set forth in section 253(a) because they enabled certain incumbent LECs to bar other entities from providing competing local service. [FN37] The Commission found that the rural incumbent protection provision's lack of competitive neutrality placed the Wyoming legal requirements outside the authority reserved to the States by section 253(b). [FN38]

*11071 14. Similarly, in the Texas Preemption Order, [FN39] the Commission preempted a section of the Texas Public Utility Act of 1995 that prohibited the

Public Utilities Commission of Texas from permitting certain competitive LECs to offer service in exchange areas of incumbent LECs serving fewer than 31,000 access lines. [FN40] The Commission found that the moratorium on competition violated the terms of section 253(a) of the Act. [FN41] The Commission also found that the Texas provision did not fall within the exempted state regulation described in section 253(b), because the prohibition was neither competitively neutral nor necessary to achieve any of the policy goals enumerated in section 253(b). [FN42]

15. Our decision here to preempt is consistent with these precedents and comports with the analysis set forth therein. Tennessee's restriction of competition in service areas with fewer than 100,000 access lines is essentially the same as the attempt of both Wyoming and Texas to shield small, rural LECs from competition, and cannot be squared with section 253(a)'s ban on state or local requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [FN43] Also, as in both the Silver Star and Texas Preemption Orders, we find that the lack of competitive neutrality renders the Tenn. Code Ann. § 65-4-201(d) and the Denial Order ineligible for the protection of section 253(b).

16. We reject the Tennessee Authority's contention that "competitive neutrality" can be interpreted under section 253(b) to mean only that non-incumbents must be treated alike while incumbents may be favored. [FN44] As we explained in our Silver Star Reconsideration, a state legal requirement would not as a general matter be "competitively neutral" if it favors incumbent LECs over new entrants (or vice-versa). [FN45] Neither the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market - new entrants - and not to all carriers in that market. The plain meaning of section 253(b) and the predominant pro-*11072 competitive policy of the 1996 Act undermine the Authority's argument. Indeed, in various similar contexts the Commission has consistently construed the term "competitively neutral" as requiring competitive neutrality among the entire universe of participants and potential participants in a market. [FN46] We reaffirm our holding in the Silver Star Reconsideration that section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, inter alia, the requirement is competitively neutral with respect to, and as between, all of the participants and potential participants in the market at issue.

17. TDS elaborates on the Authority's argument by contending that competing LECs do not operate under the same terms and conditions as incumbent LECs, and that this disparity in their regulatory obligations permits the Tennessee Authority to treat them differently and still maintain competitive neutrality. [FN47] TDS thus argues that the principle of "competitive neutrality" does not preclude carriers in dissimilar situations from being treated somewhat differently. Providing for "somewhat" different treatment, however, is an entirely distinct proposition from barring competitive entry altogether. [FN48] At the very least, "competitive neutrality" for purposes of 253(b) does not countenance absolute exclusion, and we need not and therefore do not reach the question of the extent to which state commissions may treat competing LECs differently from incumbent LECs in certain instances. We find here that because Tenn. Code Ann. § 65-4-201(d) favors incumbent LECs with fewer than 100,000 access lines by preserving their monopoly status, it raises an insurmountable barrier against potential new entrants in their service areas and therefore is not competitively neutral.

18. That Tenn. Code Ann. § 65-4-201(d) and the Denial Order are not competitively neutral suffices of itself to disqualify these requirements from the 253(b) *11073 exception. [FN49] Therefore, we need not reach the question of whether Tenn. Code Ann. § 65-4-201(d) and the Denial Order are "necessary," or "consistent with section 254" within the meaning of section 253(b). We note, however, that, for the reasons we gave in response to similar arguments that were raised in our Silver Star Preemption Order decision, we remain doubtful that it is necessary to exclude competing LECs from small, rural study areas in order to preserve universal service [FN50] Moreover, by requiring competitive neutrality, Congress has already decided, in essence, that outright bans of competitive entry are never "necessary" to preserve and advance universal service within the meaning of section 253(b). [FN51]

19. TDS introduces three arguments by which it attempts to distinguish the case before us from other cases we have decided under section 253. First, TDS points out that the Tennessee legislature provided for Tenn Code Ann. § 65- 4-201(d) to be examined every two years to reevaluate the "transitional distinction" in treating applications to serve areas served by incumbent LECs with fewer than 100,000 access lines, and contrasts Tennessee's biennial review with the Wyoming statute at issue in the Silver Star Preemption Order, which gave rural incumbent LECs a veto provision that would apply until 2005. [FN52] This is a distinction without a difference for purposes of our analysis because, as we held in the Silver Star Preemption Order, even a temporary ban on competition can be an absolute prohibition, and section 253 does not exempt from its reach State-created barriers to entry that may expire at some later date. [FN53]

*11074 20. Second, TDS argues that "unanticipated confusion and controversy surrounding the universal service plan" justifies the Tennessee Authority's delay of competitive entry into rural areas [FN54] As the Commission has previously stated, we reject the assumption that competition and universal service are at cross purposes, and that in rural areas the former must be curtailed to promote the latter. [FN55] Section 253 is itself evidence that Congress intended primarily for competitive markets to determine which entrants should provide the telecommunications services demanded by consumers. [FN56] We continue to believe that Congress intended new competitors to bring the benefits of competition to rural as well as populous markets. [FN57]

21 Third, TDS contends that even if the Commission is correct in preempting enforcement of the Authority's Denial Order, the Commission should not preempt Tenn Code Ann. § 65-4-201(d) itself. [FN58] TDS argues that although the Authority has applied the statute to preclude competition in this case, the statute permits the Authority to allow competition in *11075 other circumstances. [FN59] TDS suggests that Tenn. Code Ann. § 65-4-201(d) might therefore be applied in way that would not offend section 253, [FN60] and therefore should be left standing, in obedience to 253(d)'s instruction to the Commission to preempt only "to the extent necessary to correct such violation or inconsistency " [FN61]

22. We are mindful of the limits that section 253 (d) places on our preemption authority. Further, the construction of a state statute by a state commission informs our determination of whether the statute is subject to preemption under section 253. [FN62] In this case, however, TDS's construction of Tenn. Code Ann. §

65-4-201(d) conflicts with that of the Tennessee Authority, which we regard as dispositive. [FN63] According to the Authority, Tenn. Code Ann. § 65-4-201(d) does require the Tennessee Authority to deny any and all CPCN applications within its scope. [FN64] For this reason we reject TDS's argument that Tenn. Code Ann. § 65-4-201(d) may stand even if the Authority's Denial Order must fall. We decline, however, to grant Hyperion's request that we direct the Tennessee Authority to grant Hyperion's application for a CPCN because we do not believe such a step is necessary at this time. [FN65] Based on our explanation regarding the force and effect of section 253 in this case, we expect that the Authority will respond to any request by Hyperion to reconsider Hyperion's application for a concurrent CPCN consistent with the Communications Act and this decision. [FN66]

23. Hyperion brings to our attention that states other than Tennessee have legal requirements that appear to be similar to Tennessee's Section 65-4- 201(d), and maintains that these requirements may also restrict competition in the way we have found unlawful here and in the Silver Star and Texas Preemption Orders. [FN67] Hyperion urges us to clarify generally the *11076 scope of section 253 as it might apply in such cases. [FN68] While the requirements of other states are not before us at this time, we would expect to apply a similar analysis to other state statutes. Thus, we encourage these and any other states, as well as their respective regulatory agencies, to review any similar statutes and regulations, and to repeal or otherwise nullify any that in their judgement violate section 253 as applied by this Commission

IV. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the Petition for Preemption and Declaratory Ruling filed by AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P. on May 29, 1998, IS GRANTED to the extent discussed herein, and in all other respects IS DENIED.

25. IT IS FURTHER ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the enforcement of Tenn. Stat. Ann. § 65-4-201(d) and the Denial Order are preempted.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. In Re: AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P.; Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Docket No. 98-0001 (Tennessee Authority Apr.

1999 WL 335803 (FCC), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172
(Cite as: 14 FCC Rcd. 11064)

9, 1998) (Denial Order).

FN2. Petition at 23.

FN3. 47 U.S.C. § 253(a). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq. All citations to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

FN4. 47 U.S.C. § 253(b).

FN5. 47 U.S.C. § 253(d). The Commission placed Hyperion's Petition on public notice on June 12, 1998. Pleading Cycle Established for Comments on Hyperion Petition for Preemption of Tennessee Regulatory Authority Order, Public Notice, CC Docket No. 98-92, DA 987-1115 (rel. June 12, 1998). The Association for Local Telecommunications Services (ALTS), KMC Telecom Inc. (KMC), MCI Telecommunications Corporation (MCI), TDS Telecommunications Corporation (TDS), the Tennessee Authority, and WorldCom, Inc. (WorldCom) filed comments, and Hyperion, MCI, and TDS filed replies.

FN6. Tenn. Code Ann. § 65-4-201(d).

FN7. Petition at 2.

FN8. Id.

FN9. Tennessee Telephone Company serves approximately 45,121 residential and 11,665 business customers in Tennessee. AVR of Tennessee, L.P., d/b/a Hyperion Telecommunications of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Extend its territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Application, Petition Exhibit D at 3.

FN10. The Application of AVR, L.P., d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Intrastate Point-to-Point and Telecommunications Access Services Within Davidson, Williamson, Maury, Rutherford, Wilson, and Sumner Counties, Tennessee, Docket No. 94-00661, (TPSC Aug. 24, 1995), Petition Exhibit B.

FN11. The Application of AVR, L.P., d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Point-to-Point and Telecommunications Access Service Within the State of Tennessee, Order, Docket No.

94-00661 (TPSC Mar. 8, 1996), Petition Exhibit C, (TPSC Restriction Order).

FN12. TPSC Restriction Order at 5.

FN13. Tenn. Code Ann. § 65-4-201; Petition at 4.

FN14. Transcript of the Tennessee Regulatory Authority's March 10, 1998, Hearing Denying Hyperion's Application, Petition Exhibit E (Hearing).

FN15. "I personally believe that the Tennessee Regulatory Authority has a duty to uphold both the vision and the substance of the Federal Communications Act of 1996. This Act provides the framework from which competition in the telecommunications industry can develop. Section 253(a) of the Act specifically addresses the prohibition of any State regulation or statute that prohibits the ability of any entity to provide any interstate or intrastate telecommunication service. As I see it, we have a conflict between the federal law and one of our State statutes, and the federal law must prevail." Chairman Greer, Hearing at 7.

FN16. "To be sure, there exists a host of arguments [that] Section 65-4-201(d) is not competitively neutral as this phrase is defined by the FCC. Nonetheless, given the legislature's rationale for enacting section 65-4-201(d), the language of section 253(b) as a whole, section 65-4-201(d)'s pronouncement that any such protected interest forfeits its protection if it seeks to compete outside the area, and the requirement that the general assembly review this statute every two years, this statute may be held competitively neutral.... I am persuaded that at a minimum the State of Tennessee should have the opportunity, should it so choose, to argue before the FCC that its statute is, notwithstanding the FCC's prior rulings, competitively neutral." Director Malone, Hearing at 11-12.

FN17. Denial Order at 11.

FN18. Petition at 8.

FN19. 47 U.S.C. § 253(a).

FN20. 47 U.S.C. § 253(b).

FN21. 47 U.S.C. § 253(d).

FN22. Petition at 6. Although Tenn. Code Ann. § 65-4-201(d) does permit competition in areas served by incumbent LECs with fewer than 100,000 access lines when the incumbent LEC enters into an interconnection agreement with the competitor

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or itself applies for CPCN outside its service area, neither exception applies to this case.

FN23. Pétition at 8.

FN24. Petition at 15-18; The Public Utility Commission of Texas, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3511, ¶¶ 106-07 (1997) (Texas Preemption Order); Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15656-57, ¶¶ 38-39 (1997) (Silver Star Preemption Order). ALTS, KMC, MCI, and WorldCom agree with Hyperion that the Tennessee statute is in direct conflict with Section 253(a). ALTS Comments at 2; KMC Comments at 2; MCI at Comments at 1; WorldCom Comments at 1-2; AVR Reply at 3; MCI Reply at 1-2.

FN25. Tennessee Authority Comments at 3-6; TDS Comments at 5-15. TDS owns four subsidiaries in Tennessee, one of which is the Tennessee Telephone Company. TDS Comments at 1.

FN26. Tennessee Authority Comments at 3-5.

FN27. Tennessee Authority Comments at 6.

FN28. Id.

FN29. TDS Comments at 6-7.

FN30. TDS Comments at 5-7; TDS Reply at 2-3.

FN31. TDS Comments at 8-10; TDS Reply at 3-4.

FN32. Id.

FN33. Petition at 10-11; ALTS Comments at 4; KMC Comments at 3-4; MCI at Comments at 3-5; Hyperion Reply at 3; MCI Reply at 2.

FN34. WYO. STAT. ANN. § § 37-15-101, et seq.

FN35. WYO. STAT. ANN. § 37-15-201(c).

1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172
(Cite as: 14 FCC Rcd. 11064)

FN36. Application of Silver Star Telephone Company, Inc. for a Certificate of Public Convenience and Necessity to Service the Afton Local Exchange Area, Order Denying Concurrent Certification, Docket No. 70006-TA-96-24 (Wyoming Commission Dec. 4, 1996)

FN37. Silver Star Preemption Order, 12 FCC Rcd at 15656-57, ¶ 38-39.

FN38. Silver Star Preemption Order, 12 FCC Rcd at 15657-59, ¶ 41-44

FN39. Texas Preemption Order, 13 FCC Rcd 3460 (1997).

FN40. Texas Public Utility Act of 1995 § 3.2531(h).

FN41. Texas Preemption Order, 13 FCC Rcd at 3511, ¶ 106.

FN42. Texas Preemption Order, 13 FCC Rcd at 3511, ¶ 107.

FN43. 47 U.S.C. § 253(a) (emphasis added).

FN44. Tennessee Authority Comments at 6.

FN45. Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, CCBPol 97-1, FCC 98-205, ¶ 9-10 (rel. Aug. 24, 1998) (Silver Star Reconsideration). See also New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19721-22, ¶ 20 (1996) (holding that legal requirement at issue was not competitively neutral under section 253(b) because "the prohibition allows incumbent LECs and certified LECs to offer payphone services, but bars another class of providers (independent payphone providers)"); Recon. denied, Memorandum Opinion and Order, FCC 97-143 (rel. April 18, 1997)

FN46. See, e.g., Telephone Number Portability, Third Report and Order, FCC 98-82, CC Docket No. 95-116, ¶ 53 (rel. May 12, 1998) (a competitively neutral cost recovery mechanism "(1) must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) must not disparately affect the ability of competing service providers to earn a normal return"), Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22132 at ¶ 24 (1997) ("Competitive neutrality would require that separations rules not favor one telecommunications provider over another or one class of providers over another class"); Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21443-44 at ¶ 206 (1996) ("If in

practice only incumbent LECs can receive universal service support, then the disbursement mechanism is not competitively neutral").

FN47. TDS Comments at 8-10; TDS Reply at 3-4.

FN48. We agree that in order to qualify for protection under section 253(b), a state legal requirement need not treat incumbent LECs and new entrants equally in every circumstance. As the Commission has previously explained: "'non-discriminatory and competitively neutral' treatment does not necessarily mean 'equal' treatment. For instance, it could be a non-discriminatory and competitively neutral regulation for a state or local authority to impose higher insurance requirements based on the number of street cuts an entity planned to make, even though such a regulation would not treat all entities 'equally.'" Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems), Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20310 at ¶ 195 (1996). See Separations NPRM, 12 FCC Rcd at 22132, ¶ 24 ("Competitive neutrality ... would not, however, preclude carriers in dissimilar situations from being treated differently").

FN49. Silver Star Preemption Order, 12 FCC Rcd at 15660, ¶ 45. Accord Texas Preemption Order, 13 FCC Rcd at 3480, ¶ 41; Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, 11 FCC Rcd. 13082, 13101, ¶ 35.

FN50. Specifically, we noted that section 251(f) of the Act affords rural and small LECs certain avenues of relief from the interconnection duties set forth in sections 251(b) and (c), and that sections 253(f) and 214(e)(2) also provide states special latitude in regulating emerging competition in markets served by rural telephone companies. Section 253(f) permits a state to require a telecommunications carrier to meet certain universal service requirements as a condition for obtaining permission to compete with a rural telephone company. Section 214(e)(2) permits a state, with respect to an area served by a rural telephone company, to decline to designate more than one common carrier as an "eligible telecommunications carrier" for purposes of receiving universal service support. These accommodations to the needs of rural telephone companies indicate that Congress recognized that the special circumstances of rural and small LECs warrant special regulatory treatment. In choosing less competitively restrictive means of protecting rural and small LECs, however, Congress revealed its intent to preclude states from imposing the far more competitively restrictive protection of an absolute ban on competition. Silver Star Preemption Order, 12 FCC Rcd at 15658-59, ¶ ¶ 43-44.

FN51. Silver Star Reconsideration, FCC 98-205, ¶ 19.

FN52. TDS at Comments 12 (contrasting Tenn. Code Ann. § 65-5-211 with Wyo. Stat. § § 37-15-101 et seq.).

FN53. Silver Star Preemption Order, 12 FCC Rcd at 15657, ¶ 39. We note that the 1996 Act contains numerous deadlines requiring the Commission and State commissions to complete with dispatch various tasks implementing the 1996 Act. See, e.g., 47 U.S.C. §§ 251(d)(1), 251(f)(1)(B); 252(e)(4); 254(a), 257(a); 271(d)(3); 276(b). By requiring relatively swift administrative implementation of the pro-competitive provisions of the 1996 Act, these deadlines highlight that Tennessee's statutory delay of competition conflicts with Congressional intent.

FN54. TDS Comments at 14; TDS Reply at 2-3.

FN55. Accord Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 8800, ¶ 47 (1997) ("competitive neutrality means that universal support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another"). See generally Federal-State Joint Board on Universal Service, Recommended Decision, 12 FCC Rcd 87, 267 ¶ 345 (1996) ("We recommend that any competitive bidding system be competitively neutral and not favor either the incumbent or new entrants").

FN56. Silver Star Preemption Order, 12 FCC Rcd at 15656, ¶ 38.

FN57. See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16118, ¶ 1262 (1996) ("We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service.") What the Commission said in the Universal Service Order regarding the "false choice" between competition and universal service also bears reiteration:

Commenters who express concern about the principle of competitive neutrality contend that Congress recognized that, in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service. We believe these commenters present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.

Universal Service Order, 12 FCC Rcd at 8802-03, ¶ 50

FN58. TDS at Comments at 15-18.

FN59. TDS Comments at 15, 17

FN60. TDS states that § 65-4-201(d) allows the Tennessee Authority to obtain

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useful information through closer scrutiny of applications to serve rural areas.
TDS Comments at 18.

FN61. TDS Comments at 15.

FN62. See Texas Preemption Order, 13 FCC Rcd at 3464-3466, ¶ 7-11

FN63. Id. See also, e.g., Ginsburg v. New York, 390 U.S. 629, 643-44 (1968).

FN64. TPSC Restriction Order at 4 ("Subsection (d) clearly restricts the authority of the Public Service Commission to grant a certificate to a Competing Telecommunications Service Provider"), see also Denial Order at 8.

FN65. Petition at 23.

FN66. Given our disposition of the Petition on the bases discussed in the text, we need not and do not address the merits of other arguments raised by the parties.

FN67. Hyperion Petition at 21; See Letter from Kecia Boney, MCI Telecommunications Corp., to Magalie R. Salas, Secretary, FCC, Jan. 6, 1999. See also Louisiana, In re Regulations for Competition in the Local Telecommunications Market, General Order, app. B, sec. 201 (LPSC, rel. Apr. 1, 1997) ("TSPs are permitted to provide telecommunications services in all historically designated ILEC services areas . . . with the exception of service areas served by ILECs with 100,000 access lines or less statewide."); New Mexico, N.M. STAT. ANN. § 63-9A-6 D (1997) ("[A]ny telecommunications company with less than one hundred thousand access lines . . . shall have the exclusive right to provide local exchange service within its certificate service territory"); North Carolina, N.C. GEN. STAT. § 62-110 f(2) (1997) ("[The Commission shall not be authorized to issue a certificate] applicable to franchised areas . . . served by local exchange companies with 200,000 access lines or less . . . "); Utah, UTAH CODE ANN. § 54-8b- 2.1(2)(c) (1953) ("An intervening incumbent telephone corporation serving fewer than 30,000 access lines in the state may petition the Commission to exclude from an application [filed by a competing LEC] any local exchange with fewer than 5,000 access lines . . . "); and Oregon, OR. REV. STAT. § 759 020 (1989), Admin. Rules Chapter 860, Div. 32, 860-32-005(8)(a) (providing for certification of competing LECs if the ILEC "consents or does not protest").

FN68. Hyperion Petition at 21.

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Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF AVR, L.P. D/B/A HYPERION OF TENNESSEE, L.P. PETITION FOR
PREEMPTION OF TENNESSEE CODE ANNOTATED SECTION 65-4-201(D) AND TENNESSEE
REGULATORY AUTHORITY DECISION DENYING HYPERION'S APPLICATION REQUESTING
AUTHORITY TO PROVIDE SERVICE IN TENNESSEE RURAL LEC SERVICE AREAS
CC Docket No. 98-92

FCC 01-3

Adopted: January 3, 2001

Released: January 8, 2001

*1247 By the Commission:

I. INTRODUCTION

1. On June 28, 1999, the Tennessee Regulatory Authority (Tennessee Authority) and TDS Telecommunications Corporation (TDS Telecom) filed petitions for reconsideration of the Hyperion Preemption Order. [FN1] In that Order, the Commission granted in part a petition for preemption filed by AVR, L.P. d/b/a Hyperion of Tennessee, L.P. (Hyperion) in May 1998. In this order we deny those petitions for reconsideration along with a related motion filed by the Tennessee Authority for a stay of enforcement of the Hyperion Preemption Order.

*1248 II DISCUSSION

2. Hyperion originally sought preemption of Tennessee Code section 65-4-201(d), which barred the entry of competitive carriers into the service areas of incumbent local exchange carriers in Tennessee that serve fewer than 100,000 access lines. In addition, Hyperion asked that this Commission preempt enforcement of an April 1998 order of the Tennessee Authority to the extent that it denied Hyperion's application to provide service in the service area of the Tennessee Telephone Company. [FN2] The Tennessee Authority and TDS Telecom now seek reconsideration of the Commission's determination that the Tennessee Authority's Denial Order and Tennessee Code section 65-4-201(d) do not fall within the protection of section 253(b) of the Communications Act of 1934, as amended. [FN3] In addition, on July 9, 1999, the Tennessee Authority filed a motion for stay of enforcement of our Hyperion Preemption Order until appropriate universal service mechanisms are implemented by the Commission and the Tennessee Regulatory Authority. [FN4] Hyperion filed an opposition to the Tennessee Regulatory Authority's motion for stay of enforcement, dated July 20, 1999, arguing that the Tennessee Regulatory Authority failed to establish any of the four conditions necessary to justify a stay of the Commission's Order. [FN5]

3. We deny TDS's and the Tennessee Authority's petitions for the following reasons. TDS's petition essentially repeats the same arguments it relied upon in

the comments and reply comments it filed in opposition to the **Hyperion** preemption petition. First, TDS argues that, because the incumbent LEC is regulated differently from competitive LECs, the "competitive neutrality" requirement under section 253(b) of the Communications Act is satisfied even if the *1249 incumbent has special protections as long as all competitive carriers are treated alike. [FN6] In a related argument, TDS argues that competitive imbalances will result from preemption of the statute. [FN7] The Commission rejected these arguments in the **Hyperion** Preemption Order.

4. TDS also argues that, because the **Hyperion** Preemption Order did not allow the **Tennessee** Authority to implement section 65-4-201(d) "to the extent permissible by law," the Commission's blanket preemption of section 65-4-201(d) was needlessly broad. [FN8] The Commission previously considered and rejected this argument, concluding that the **Tennessee** Authority's own interpretation of **Tennessee Code section 65-4-201(d)**, which the Commission regards as dispositive, made section 65-4-201(d) inconsistent with federal law in every circumstance. [FN9] TDS has failed to identify any redeemable portion of the preempted law [FN10] Accordingly, we conclude that the Commission's preemption was in fact limited to the extent necessary to correct the violation of federal law in accordance with section 253(d) of the Communications Act. TDS's petition fails to raise new arguments or facts that would warrant reconsideration of that order

5. The **Tennessee** Authority also repeats in its petition for reconsideration the arguments it made regarding the **Hyperion** preemption petition. Those arguments include: (1) that preemption of **Tennessee Code section 65-4-201(d)** is not competitively neutral to **Tennessee** rural incumbent carriers because these carriers have obligations under state and federal laws that are not imposed on new entrants, [FN11] (2) that **Tennessee Code section 65-4-201(d)** is necessary to *1250 preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers within the state of **Tennessee**; [FN12] and (3) that the Commission did not fully consider the unity of purpose behind the 1996 Act and **Tennessee Code section 65-4-201(d)** [FN13] That both the 1996 Act and section 65-4-201(d) address similar concerns about the effect of competitive entry on rural incumbent carriers does not insulate the **Tennessee** statute from section 253 preemption. Instead, Congress appears to have entirely occupied the field of regulating rural competitive entry when it addressed the issue comprehensively in sections 251(f) and 153(37). [FN14] Just as TDS Telecom and the **Tennessee** Authority raise no new arguments or facts that warrant reconsideration of the **Hyperion** Preemption Order, the **Tennessee** Authority raises no new arguments or facts that warrant a stay of enforcement. [FN15]

6. Accordingly, IT IS ORDERED, pursuant to section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by TDS Telecommunications Corporation and the petition for reconsideration filed by the **Tennessee** Regulatory Authority, both dated June 28, 1999, ARE DENIED.

7. IT IS FURTHER ORDERED, that the **Tennessee** Regulatory Authority's motion for stay of enforcement, filed on July 9, 1999, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. AVR, L.P., d/b/a Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas, Memorandum Opinion and Order, CC Docket No. 98-92, 14 FCC Rcd 11064 (1999) (Hyperion Preemption Order).

FN2. In Re: AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P., Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Docket No. 98-0001 (Tennessee Authority Apr. 9, 1998) (Denial Order). The Tennessee Telephone Company is a wholly-owned subsidiary of TDS Telecom.

FN3. 47 U.S.C. § 253(b). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § § 151 et seq. All citations to the 1996 Act in this order are to the 1996 Act as codified in Title 47 of the United States Code. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Section 253(b) states that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b).

FN4. Tennessee Regulatory Authority Motion for Stay at 1.

FN5. The Commission applies a four-part test in consideration of motions for stay. See Virginia Petroleum Jobbers Ass'n, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). To justify a stay, the Tennessee Regulatory Authority must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm in the absence of a stay, (3) the absence of any substantial harm to other interested parties if the stay is granted, and (4) that public interest favors the stay.

FN6. TDS Petition for Reconsideration at 5-6, 10 TDS made this argument in its comments at 5-7 and its reply comments at 2. The Commission rejected the argument in the Hyperion Preemption Order, 14 FCC Rcd at 11071-72, ¶ ¶ 15-16.

FN7. TDS Petition for Reconsideration at 6-8. TDS made this argument in its comments at 8-11 and its reply comments at 3-4. The Commission rejected the argument in the Hyperion Preemption Order, 14 FCC Rcd at 11072, ¶ 17.

FN8. TDS Petition for Reconsideration at 12. TDS appears to be referring to section 253(d) of the Communications Act instead of section 253(b). TDS made this argument in its comments at 15-18.

FN9. Hyperion Preemption Order, 14 FCC Rcd 11075, ¶ 22.

FN10. We note that the scope of section 65-4-201(d) is extremely limited and that its preemption does not impinge on any of the Tennessee Authority's general safeguards. Tenn. Code Ann. 65-4-201(d) states, in its entirety, "Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on the June 6, 1995."

FN11. Tennessee Authority Petition for Reconsideration at 4 - 7. The Tennessee Authority made this same argument in its comments regarding the Hyperion Preemption Petition. Comments in Response to Hyperion Petition for Preemption, filed July 13, 1998, at 6, ¶ 8. The Commission previously considered and rejected this argument in the Hyperion Preemption Order, stating that "[n]either the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market - new entrants - and not to the market as a whole, including the incumbent LEC." Hyperion Preemption Order, 14 FCC Rcd at 11071-72, ¶ 16, citing Silver Star Reconsideration Order, 13 FCC Rcd 16359 (1998). The United States Court of Appeal for the Tenth Circuit recently affirmed the Commission's Silver Star Reconsideration Order in RT Communications, Inc. v. FCC, 201 F.3d 1264 (10th Cir. 2000).

FN12. Tennessee Authority Petition for Reconsideration at 8-11. The Commission rejected this argument at Hyperion Preemption Order, 14 FCC Rcd at 11074, ¶¶ 18, 20.

FN13. Tennessee Authority Petition for Reconsideration at 11-13; Hyperion Preemption Order, 14 FCC Rcd at 11074, ¶¶ 18, 20.

FN14. See 47 U.S.C. § 153(37); 47 U.S.C. § 251(f). See also 47 U.S.C. § 253(f).

FN15. The Tennessee Authority recognizes that a party seeking a stay must demonstrate, among other criteria, that it is likely to prevail on the merits.

2001 WL 12939 (F.C.C.), 16 FCC Rcd 1247
(Cite as: 16 F.C.C.R. 1247)

Tennessee Authority Motion at 1. Therefore, in as much as we decide against the Tennessee Authority on the merits, the Tennessee Authority's motion for a stay of enforcement is denied.

2001 WL 12939 (F.C.C.), 16 F.C.C.R. 1247, 16 FCC Rcd. 1247

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Office of the Secretary of State

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1984 APR 12 11 34 AM

I, WILLIAM T. QUILLEN, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY "CITIZENS TELECOMMUNICATIONS COMPANY" IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW AS OF THE EIGHTH DAY OF APRIL, A.D. 1984.

*William T. Quillen*

William T. Quillen, Secretary of State

2342881 8300

AUTHENTICATION: 7082461

044059230

DATE: 04-08-84

Secretary of State

Corporations Section

James K. Polk Building, Suite 1800
Nashville, Tennessee 37243-0306

DATE: 04/18/94
REQUEST NUMBER: 2836-1190
TELEPHONE CONTACT: (615) 741-0537
FILE DATE/TIME: 04/18/94 0946
EFFECTIVE DATE/TIME: 04/18/94 0946
CONTROL NUMBER: 0278200

TO:
PRENTICE HALL
ATTN JOEY KELLEY
500 CENTRAL AVE
ALBANY, NY 12206

RE:
CITIZENS TELECOMMUNICATIONS COMPANY
APPLICATION FOR CERTIFICATE OF
AUTHORITY - FOR PROFIT

WELCOME TO THE STATE OF TENNESSEE. THE ATTACHED CERTIFICATE OF
AUTHORITY HAS BEEN FILED WITH AN EFFECTIVE DATE AS INDICATED ABOVE.

A CORPORATION ANNUAL REPORT MUST BE FILED WITH THE SECRETARY OF STATE
ON OR BEFORE THE FIRST DATE OF THE FOURTH MONTH FOLLOWING THE CLOSE OF THE
CORPORATION'S FISCAL YEAR. PLEASE PROVIDE THIS OFFICE WITH WRITTEN
NOTIFICATION OF THE CORPORATION'S FISCAL YEAR. THIS OFFICE WILL MAIL THE
REPORT DURING THE LAST MONTH OF SAID FISCAL YEAR TO THE CORPORATION AT THE
ADDRESS OF ITS PRINCIPAL OFFICE OR TO A MAILING ADDRESS PROVIDED TO THIS
OFFICE IN WRITING. FAILURE TO FILE THIS REPORT OR TO MAINTAIN A REGISTERED
AGENT AND OFFICE WILL SUBJECT THE CORPORATION TO ADMINISTRATIVE REVOCATION
OF ITS CERTIFICATE OF AUTHORITY.

WHEN CORRESPONDING WITH THIS OFFICE OR SUBMITTING DOCUMENTS FOR
FILING, PLEASE REFER TO THE CORPORATION CONTROL NUMBER GIVEN ABOVE.

FOR: APPLICATION FOR CERTIFICATE OF
AUTHORITY - FOR PROFIT

ON DATE: 04/18/94

FROM:
PRENTICE HALL LEGAL & FIN (ALBANY, NY)
500 CENTRAL AVENUE

ALBANY, NY 12206-0000

RECEIVED: FEE \$300.00 TAX \$300.00
TOTAL PAYMENT: \$600.00
RECEIPT NUMBER: 000016474C
ACCOUNT NUMBER: 00054845



Riley C. Darnell

RILEY C. DARNELL
SECRETARY OF STATE